Supreme Court, U.S.
FILED
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94

No. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

SUE WALSTON,

Petitioner

v.

LARRY WALSTON, WILLIAM V. DUNNAM, JR., C. VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP AND CENTRAL TRANSPORTATION SYSTEMS

Respondents

On Petition for Writ of Certiorari To
The Court of Appeals For The Tenth District of Texas
At Waco, Texas

PETITION FOR WRIT OF CERTIORARI

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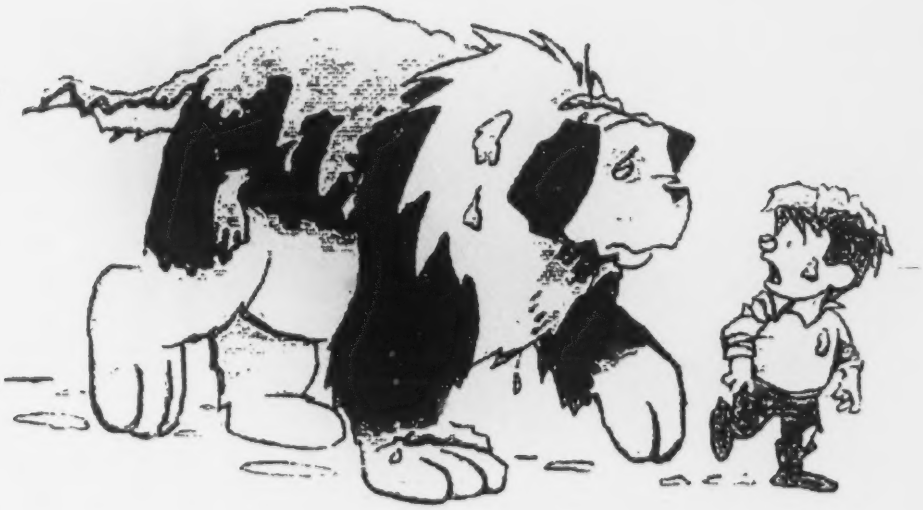

"Remember, Howard, we have to avoid even the appearance of wrongdoing."

From "LaughParade" by Bunny Hoest and John Reiner
Parade Magazine
August 21, 2005

QUESTION PRESENTED FOR REVIEW

Whether the laws of Texas which permit state court judges at all levels of the judiciary to accept campaign and officeholder contributions and the rules of procedure promulgated by the state supreme court which allow and encourage judges to participate in the determination of cases in which contributors have an interest conspire to violate a litigant's due process right to hearing by a tribunal which is, and which appears to be, impartial as contemplated by the Fourteenth Amendment to the CONSTITUTION of the United States.

TABLE OF CONTENTS

Question Presented for Review i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Statement of Notification 1

Constitutional Provision Involved 1

Statement of the Case:

Proceedings Below 2

Reasons for Granting the Petition:

1. The conflict with generally held standards of impartiality in the judiciary created by a judicial election system reliant upon monetary contributions and political partisanship has become an issue of national concern. This case presents an important and recurring constitutional question about the Due Process rights of civil and criminal litigants in Texas and other states in which judges stand for partisan election supported by contributions from interested parties. 7

2. The Court has previously recognized the importance of the question presented, but has never directly addressed the issue..... 15

Petitioner's Appendix:

Opinion

Texas Court of Appeals ..... Pet. App. 2

Denial of Petition for Review

Supreme Court of Texas ..... Pet. App. 25

Denial of Motion for Reh'g

Supreme Court of Texas ..... Pet. App. 26

Petition for Review

Supreme Court of Texas ..... Pet. App. 27

Motion for Recusal or Disqualification

Tenth Court of Appeals..... Pet. App. 46

Order on Motion for Recusal

Tenth Court of Appeals..... Pet. App. 49

TABLE OF AUTHORITIES

CASES — PAGE

Aguilar v. Anderson
855 S.W.2d 799, 802 (Tex.App.–El Paso 1993, denied) 9

Apex Towing Co. v. Tolin
997 S.W.2d 903, 907 (Tex. 1999)..... 9

Degarmo v. State
922 S.W.2d 256, 267 (Tex.App.–Houston [14th Dist.]1996, writ refused)..... 10

In re Murchison
349 U.S. 133, 136 (1955) 14

J-IV Invs. v. David Lynn Mach., Inc.
784 S.W.2d 106, 107 (Tex.App.–Dallas 1990, n.w.h.) 9

Marshall v. Jerrico, Inc.
446 U.S. 238, 242 (1979) 15

Minnesota v. White
536 U.S. 765 (2002) 15

New York State Bd of Elections v. Lopez Torres
06-766, opinion Jan. 16, 2008 15

TABLE OF AUTHORITIES (continued)

Porter v. Singletary
49 F.3d 1483, 1489 (11th Cir. 1995) 8

River Road Neighborhood Ass'n v. South Texas Sports, Inc.
673 S.W.2d 952, 953 (Tex.App.–San Antonio 1984, n.w.h.) 9

Rogers v. Bradley
909 S.W.2d 872, 883 (Tex. 1995)..... 10

Texaco, Inc. v. Pennzoil, Co.
729 S.W.2d 768, 843 (Tex. App.–Houston [1st Dist.] 1987, refused n.r.e.) 9

Tumey v. Ohio
273 U.S. 510, 532 (1926) 15

Williams v. Viswanathan
65 S.W.3d 685, 689 (Tex.App.–Amarillo 2001, n.w.h.) 10

Withrow v. Larkin
421 U.S. 35, 47 (1975) 15

FEDERAL CONSTITUTION AND STATUTES

UNITED STATES CONSTITUTION,
Fourteenth Amendment .....passim, 14

TABLE OF AUTHORITIES (continued)

TEXAS CONSTITUTION, STATUTES AND RULES

TEXAS CONSTITUTION, Article V § 2(c) 4
TEXAS CONSTITUTION, Article V § 6(b) 4
TEXAS CONSTITUTION, Article V § 7, 15, 18(a) 5
TEXAS CONSTITUTION, Article V § 31(b) 14
TEXAS ELECTION CODE § 251.001 5

OTHER AUTHORITIES

JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION 12

PUBLIC CONFIDENCE IN TEXAS COURTS:
A SUMMARY REPORT 11

PAY TO PLAY 11

TEXAS ADVISORY COMMITTEE ON THE CODE OF
JUDICIAL CONDUCT: FINAL REPORT 13

TEXAS ETHICS ADVISORY OPINION NO. 445 8

THE COURTS AND THE LEGAL PROFESSION IN TEXAS:
THE INSIDER'S PERSPECTIVE 11

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth District of Texas in cause No. 10-05-00193-CV (Pet.App. 2) is unreported. The denial of Petitioner's Petition for Review in the Texas Supreme Court in cause No. 07-0645 (Pet.App. 25) is unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the state Court of Appeals for the Tenth District of Texas was entered on May 9, 2007, and Petitioner's Motion for Rehearing was denied on June 12, 2007. The Supreme Court of Texas denied Petition for Review on November 30, 2007 and denied a Motion for Rehearing on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT OF NOTIFICATION

Where this petition draws into question the constitutionality of the laws of the State of Texas and 28 U.S.C. § 2403(b) may apply, Petitioner has served the Attorney General of Texas in compliance with Rule 29.4(c)

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the UNITED STATES CONSTITUTION provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Proceedings Below

In her fourth appeal from divorce proceedings Petitioner Sue Walston moved for recusal or disqualification of appellate Justices Vance and Reyna complaining that Texas laws which allow judges at all levels of the judiciary to hear cases in which contributors to their campaigns and officeholder accounts have an interest violate her right to hearing by a tribunal which is, and which appears to be, impartial as contemplated by the Fourteenth Amendment to the UNITED STATES CONSTITUTION. (Pet.App. 46).[1] The court denied the motions (Pet.App. 49) and the panel, including Justices Vance and Reyna, proceeded to appellate review of the case below, affirming the appealed trial court judgment. (Pet.App. 2-23).

Walston filed a petition for review in the state supreme court requesting review of five issues including:

ISSUE FIVE

"Whether the laws of Texas which permit state court judges at all levels to accept con-

[1] Because the motions for recusal of Justices Vance and Reyna are identical save for the address to the individual justice, only the motion for recusal of Justice Vance is reproduced in the Appendix.

tributions for the purpose of defraying campaign costs and other expenses, and the rules of procedure promulgated by the Court which allow and encourage judges to participate in the determination of cases in which contributors have an interest conspired to violate Petitioner's due process right to hearing by a tribunal which is, and which appears to be, impartial as contemplated by the Fourteenth Amendment to the CONSTITUTION of the United States." (Pet.App. 41)

Both the petition and Walston's motion for rehearing were denied. (Pet.App. 25, 26).

II. Reasons for Granting the Petition

1. The conflict with generally held standards of impartiality in the judiciary created by a judicial election system reliant upon monetary contributions and political partisanship has become an issue of national concern. This case presents an important and recurring constitutional question about the Due Process rights of civil and criminal litigants in Texas and other states in which judges stand for partisan election supported by contributions from interested parties.

Courts have suggested that the manner in which individual states select judges is not a constitutional issue. This non-lawyer Petitioner agrees. The issue before the Court is not whether Texas may chose to elect its judges, but whether the procedures established to facilitate that election process violate Petitioner's constitutional right to hearing by an impartial tribunal. Petitioner's independent claim

for denial of procedural due process arises here because the State of Texas has failed to provide an adequate process to remedy the legal errors complained of where judges at all levels of the judiciary may have accepted, or may still accept, contributions from parties with an interest in her case.

The laws that the State of Texas has enacted and enforce which allow judicial candidates and judicial officeholders to solicit and accept contributions from parties who may have an interest in proceedings before the court on which the candidates or officeholders will sit are in violation of Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the UNITED STATES CONSTITUTION where such laws force non-contributing litigants to bring their cases before judges whose decisions may be tainted, or may appear to be tainted, by consideration of a contributing party's interest in the outcome of the case.

Article Five of the TEXAS CONSTITUTION provides that judges at all levels of the state judiciary be elected by qualified voters of the state.[2] The TEXAS

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[2] The TEXAS CONSTITUTION, Article V § 2(c):

"Said Justices [Supreme Court] shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years; and shall each receive such compensation as shall be provided by law."

TEXAS CONSTITUTION, Article V § 6(b):

"Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law."

ELECTION CODE permits judicial office-holders and judicial candidates to accept officeholder and campaign contributions with some limitation on the amount and timing of contributions and permits political committees to expend funds in support of judicial officeholders and judicial candidates.

TEXAS ELECTION CODE § 251.001 defines the following:

> "Campaign contribution means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution."
>
> "Officeholder contribution means a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that:
>
> (A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and
>
> (B) are not reimbursable with public money."
>
> "Officeholder expenditure means an expenditure made by any person to defray expenses

---

TEXAS CONSTITUTION, Article V § 7, 15, and 18(a) are not recited here, but provide for general election of district court judges, county court judges, justices of the peace and constables.

that:

(A) are incurred by an officeholder in performing a duty or engaging in an activity in connection with the office; and

(B) are not reimbursable with public money."

Judicial candidates and judicial officeholders are required to file with the Texas Ethics Commission periodic disclosure reports for the purpose of informing the public of how much and from whom contributions are accepted and how those contributions are expended.[3]

Disclosure reports filed with the Texas Ethics Commission indicate that Texas Supreme Court justices expend tens of thousands of dollars in non-election years to defray such expenses as air travel, both in-state and out, domestic and foreign, for judges and spouses; newspaper subscriptions; cell phones; long-distance telephone charges; tickets and travel to presidential inaugural events; local charity ball tickets; various club and professional organization dues; court staff lunches, dinners and parties, parties, parties; expeditions to wild game hunting ranches and hunting equipment; mileage reimbursement for travel to work; automobile leases; charitable donations; political contributions; and expensive gifts to undisclosed recipients.

Giving Texas judges the benefit of every doubt, and assuming that all of the expenditures disclosed fall strictly within the scope of the TEXAS ELECTION

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[3] Available from the year 2000 forward at www.ethics.state.tx.us/whatsnew/srchinfo.

CODE definition of expenses that are incurred by judges in performing their duty or engaging in an activity in connection with the office, these expenditures are not reimbursable with public funds. Therefore, if contributions, including contributions from interested parties, were not available, Texas judges would have to pay for tickets and travel to presidential inaugural events from their own pockets or forgo the adventure; pay bar association dues – local, state and national – from their own pockets and economize elsewhere; pay for newspaper subscriptions from their own pockets or go to the local library to read the daily papers for free; buy charity ball tickets from their own pockets or forgo the enjoyment; pay from their own pockets any travel expenses to those events and for those purposes which are not related directly enough to performance of their duty to be reimbursable by the State or forgo the opportunity; pay for their spouse's travel from their own pockets or leave them at home and suffer the consequences; pay for their own cell phones or forgo the convenience; pay for hunting trips from their own pocket or forgo the pleasure of shooting a wild animal tied to a tree; drive to work on their own nickel like the rest of us; and pay social club dues and fees from their own pockets or forgo membership privileges. Any argument that a Texas judicial officeholder's interest in securing and retaining as much in contributions from as many contributors as possible is not a direct, personal, substantial and pecuniary interest must fail in the face of such evidence to the contrary.

Dependence upon this goody money is so ingrained in the mindset of Texas judges that, in 2002, the Texas Ethics Commission was, "asked to

consider whether an individual who now holds a federal judicial office may use political contributions accepted as a Texas judicial candidate or officeholder to make expenditures in connection with the federal judicial office."[4] The Commission determined that, "Section 253.161(b) of the Election Code does not prohibit a federal judge from using political contributions accepted as a Texas judicial candidate or officeholder to make expenditures in connection with the federal office," and, "The personal use prohibition in section 253.035 of the Election Code does not prohibit a federal judge from using political contributions accepted as a Texas judicial candidate or officeholder to make expenditures in connection with the federal office." Is there provision in federal statutes addressing the acceptance and use of political contributions by federal judges?

Only those candidate and officeholder disclosure reports filed electronically from the year 2000 forward are readily accessible to the public. Accessing reports filed prior to 2000 or reports filed by officeholders who are exempt from electronic filing is extraordinarily inconvenient and expensive. The necessity of research into the source of funds used by judicial officeholders to obtain their offices and to enhance their lifestyles imposes an unreasonable burden on litigants who have a constitutional right to appear in court with the presumption that they will be heard by an impartial tribunal. *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995).

But any research which discloses information that might lead to suspicion that judges before whom

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[4] Ethics Advisory Opinion No. 445, issued July 12, 2002. Available at http://www.ethics.state.tx.us/opinions/445.html

the litigant appears have accepted contributions from parties interested in the outcome of the case serves absolutely no purpose. The Supreme Court of Texas is authorized by the Texas Constitution and the Texas Government Code to promulgate rules of civil procedure for all courts as may be necessary for the efficient and uniform administration of justice.[5] The court's authority extends to promulgating rules governing recusal of judges, but the court does not mandate recusal of judges who have accepted contributions from parties with an interest in the outcome of cases before the courts and the supreme court and state appellate courts have repeatedly ruled that acceptance of contributions from parties with an interest in cases before the court is not cause for recusal of judges in Texas. *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. 1999) (no recusal required where judge received "substantial political donations from counsel and from one of the parties"); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex.App.–El Paso 1993, denied) (judge solicited and lawyer contributed while case was pending, but recusal not required); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex.App.–Dallas 1990, n.w.h.) (no recusal where lawyer contributed to judge after verdict but before decision on motion for judgment n.o.v.); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 843 (Tex. App.–Houston[1st Dis.] 1987, refused n.r.e.) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952, 953 (Tex.App.–San Antonio 1984, n.w.h.) (recusal denied although 21.7% of total

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[5] Texas CONSTITUTION, Article 5, Section 31, and TEXAS GOVERNMENT CODE § 22.003

campaign contributions of one appellate justice came from appellee's lawyer and 17.1% of contributions to another justice came from appellee); *Williams v. Viswanathan,* 65 S.W.3d 685, 689 (Tex.App.–Amarillo 2001, n.w.h.) (no recusal although appellee's counsel made contributions to justice); *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex.App.–Houston [14th Dist.] 1996, writ refused) (recusal not required where judge in criminal trial accepted campaign contribution from victim's family).

In *Rogers v. Bradley*, then-Texas Supreme Court Justice Enoch rationalized limitation of the scope of rules addressing recusal and disqualification by insisting that Texans know that judges must accept contributions to secure their elected seats and that any reasonable Texan should know that contributions are given with the expectation of consideration of the interests of contributors by elected officials. *Rogers v. Bradley*, 909 S.W.2d 872, 883 (Tex. 1995). Justice Enoch went on to say, "As long as judges are subject to any electoral process, our rules must be construed to encourage citizen involvement, not to chill it." *Id.* at 883.

In its order denying Petitioner's motions for recusal, the court of appeals relies on *Rogers* for guidance, writing:

> "Walston cites Justice Gammage's Declaration of Recusal in *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995), in support of her motions. We note, however, Justice Enoch's response in which he observes that four other members of the court, who were similarly challenged, neither recused themselves nor were recused by the court. *Id.* At 880 (Enoch,

J. responding)." (Pet.App. 51)

Even if judges participating in a decision have never received contributions from an interested party, election laws and rules of procedure which allow that those judges may accept future contributions from parties with an interest in the outcome of the proceedings create the presumption that they will do so and the court's precedent opinions encourage them to rule in a manner that will encourage such contributions.

Surveys sponsored by the Texas Supreme Court in 1998 and 1999 found that 83% of Texas adults, 69% of court personnel, 79% of Texas lawyers and 48% of Texas judges believe that campaign contributions impacted judicial decisions "very" or "fairly" significantly.[6]

One study comparing contributions by attorneys and law firms to Texas Supreme Court justices and the Court's rate of granting petitions for discretionary review between 1994 and 1998 indicated a strong correlation between contributions and judicial decisions. The study disclosed that the average petition-acceptance rate is 11 percent, but the rate increased to 56 percent for petitioners who contributed more than $250,000. The acceptance rate for non-contributors was 5.5 percent.[7] It

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[6] See SUPREME COURT OF TEXAS, STATE BAR OF TEXAS AND TEXAS OFFICE OF COURT ADMINISTRATION, PUBLIC CONFIDENCE IN TEXAS COURTS: A SUMMARY REPORT (December 1998) and THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE (August 1999). Available at: http://courts.state.tx.us/publicinfo/reports.asp

[7] See TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY (2001). Available at www.tpj.org/docs/2001/04/reports/paytoplay/index.htm

appears that, as a non-contributor, Petitioner had less than one-tenth the chance of having the merits of her petition for review considered by the court as that of a litigant-contributor with sufficient funds to reward the court for its attention.

At a September 2002, conference sponsored by the Research and Policy Committee of the Committee for Economic Development, announcing publication of its report JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION, Mark Lanier a Houston attorney and a trustee of the committee, was introduced as someone who characterizes the Texas justice system as "juke box justice". You put your quarter in, you make your selection, and your judge sings your tune. In its report, the committee concluded that:

> "An effective judiciary depends on perceptions of its fairness and neutrality. To the extent that members of the public perceive the court to be influenced by campaign contributions, public confidence in the judiciary is eroded. The current system yields perceptions of corruption or undue influence that need to be addressed if the judiciary is to fulfill its purpose in our democratic society." [8]

The Advisory Committee on the Code of Judicial Conduct established by the Texas supreme court to review and revise the state judicial disciplinary code

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[8] See JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION. ISBN 0-87186-146-1, 2002, page 24. The Research and Policy Committee of the Committee for Economic Development. Available at www.ced.org/docs/report/report_judicial.pdf.

in the wake of the U.S. Supreme Court's *Minnesota v. White* decision recommended the following addition to the Preamble of the Canons[9]:

> "Public confidence in the judiciary is eroded by improper conduct by judges. A judge should avoid all impropriety and appearance of impropriety, and should expect to be the subject of public scrutiny. The public should expect, and a judge should therefore accept, certain restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

The CJC Final Report recommended the addition of the word "impartiality" to Canon 1, so that it would read:

> "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity, impartiality and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective."

But Canon 8(B) includes the following definitions:

1. "Shall" or "shall not" denotes binding obligations the violation of which can

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[9] Final Report available at www.supreme.courts.state.tx.us/rules/CJC_hearings_053105.htm

result in disciplinary action.

2. "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

The CONSTITUTION of the United States does not guarantee Petitioner a hearing before a tribunal that only "aspires" to be impartial.

Section 1 of the Fourteenth Amendment to the UNITED STATES CONSTITUTION provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A fair trial before an impartial tribunal is a basic requirement of due process and our system of law endeavors to prevent even the probability of unfairness. *In re Murchison*, 349 U.S. 133, 136 (1955). The Court has found that the requirement of neutrality "preserves both the appearance and reality of fairness" by "ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find

against him". *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1979). The Court has further determined that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" denies due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1926).

Justice must satisfy the appearance of justice but, so long as the lifestyles and the livelihood of Texas judges, including Texas Supreme Court justices, depend on their ability to attract campaign contributors who have an interest in cases before the courts, justice will continue to appear to be, and probably will be, for sale in Texas.

Where Texas judges have a financial interest in the outcome of any case which involves the interest of a contributor, and apparently little or no interest in the outcome of any case which does not involve the interest of a contributor, the probability of actual bias on the part of the judges who heard Petitioner's appeal is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Petitioner cannot afford to purchase justice and is morally opposed to doing so.

2. The Court has previously recognized the importance of the question presented, but has never directly addressed the issue.

On at least two occasions, the Court has granted review and addressed procedural issues affecting the constitutional rights of judges running for election in their individual states. *Minnesota v. White*, 536 U.S. 765 (2002), *New York State Bd of Elections v. Lopez Torres*, 06-766

opinion Jan. 16, 2008. Petitioner's constitutional right to not be victimized by the judicial election process is no less compelling.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted and the judgment of the Tenth Court of Appeals reversed and remanded for hearing before a tribunal which is, and which appears to be, independent and impartial.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
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No. (2)

IN THE

SUPREME COURT OF THE UNITED STATES

SUE WALSTON,

Petitioner

v.

LARRY WALSTON, WILLIAM V. DUNNAM, JR., C. VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP AND CENTRAL TRANSPORTATION SYSTEMS

Respondents

On Petition for Writ of Certiorari To
The Court of Appeals For The Tenth District of Texas
At Waco, Texas

PETITIONER'S APPENDIX

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PETITIONER'S APPENDIX

Table of Contents

Opinion of Court of Appeals 1

Texas Supreme Court Denial of Pet. for Review 25

Texas Supreme Court Denial of Reh'g 26

Petition for Review 27

Motion for Recusal or Disqualification 46

Order on Motions for Recusal 49

IN THE
TENTH COURT OF APPEALS

No. 10-05-00193-CV

IN THE MATTER OF THE MARRIAGE OF
SUE WALSTON AND LARRY WALSTON

From the 19th District Court
McLennan County, Texas
Trial Court No. 92-3724-1

MEMORANDUM OPINION

This is the fourth direct appeal from the divorce proceedings of Sue and Larry Walston.[1] In the latest trial, a jury: (1) determined the fair market value for each of about 100 assets held by the marital estate; (2) found that both parties had engaged in some tortious acts but refused to find that they had engaged in others; (3) found that Central Transportation Systems, Inc. had transported and stored the Walstons' personal property under an agreement with a receiver who acted on the Walstons' behalf; and (4) found that the Walstons owed Central Transportation $35,013 in transportation and storage fees and $5,000 in trial attorney's fees. The court's judgment largely corresponds to the jury's findings. Among other things, the

which Sue and Larry were each found to have an undivided one-half separate property interest by decreeing that Larry had the right to purchase Sue's interest for $40,000; (2) divides the various community property assets between Sue and Larry; (3) awards $39,446[2] to Central Transportation for transportation and storage fees and trial attorney's fees to be paid out of community property funds in the court's registry; and (4) decrees that $800 of funds in the court's registry (to the extent any funds remained after Central Transportation was paid) be applied to pay an Internal Revenue Service bill for taxes owed on the interest accrued by the funds in the registry.

Sue contends in eight issues that:

(1) this Court lacks jurisdiction because the trial court's judgment is not final;

(2) the judgment is void because the trial judge is constitutionally disqualified;

(3) the court abused its discretion by sustaining the special exceptions filed by Larry's attorneys and dismissing her conspiracy claims against them;

(4) the court abused its discretion by denying her continuance motions;

(5) the court erred by awarding damages to Central Transportation;

(6) Section 117.054 of the Local Government Code, which permits a trial court clerk to retain 10% of any interest earned by funds in the court's registry, violates her right to due process;

(7) the court failed to divide the community estate in a just and right manner; and

(8) the jury question submitted on her conspiracy claim is erroneous.

We will affirm.

Finality of Judgment

Sue contends in her first issue that this Court does not have jurisdiction because the judgment is too indefinite and uncertain to constitute a final judgment. She argues that the judgment is too indefinite because disputes remain about what documentation she must sign before Larry's purchase of her one-half separate property interest in the Cessna can be effectuated. We disagree.

"After a full trial on the merits, the statement in a judgment that all relief not requested is denied signifies finality." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 201 (Tex. 2001). The judgment in this case has such a statement, and "there is nothing to indicate that the trial court did not intend to finally dispose of the entire case." *Moritz v. Preiss*, 121 S.W.3d 715, 719 (Tex. 2003). Accordingly, we overrule Sue's first issue.

Constitutional Disqualification

Sue contends in her second issue that the judgment is void because the trial judge is constitutionally disqualified due to his service as counsel in the case.

Under article V, section 11 of the Texas Constitution, a judge is disqualified "when the judge shall have been counsel in the case." TEX. CONST. art. V, § 11. "Before a judge is disqualified on this ground, 'it is necessary that the judge acted as counsel for some of the parties in [the] suit before him in some proceeding in which the issues were the same as in the case before him.'" *In re O'Connor*, 92 S.W.3d 446, 448 (Tex. 2002) (orig. proceeding) (per curiam) (quoting *Lade v. Keller*, 615 S.W.2d 916, 920 (Tex. Civ. App.—Tyler 1981, no writ)).

Sue contends that the trial judge is disqualified under this provision because he "advocated on Larry's behalf" in a post-judgment hearing regarding the documentation she

must sign to effectuate Larry's purchase of her interest in the Cessna. The judge ruled as follows on Sue's motion to release funds Larry deposited in the registry as payment for her interest:

> MOTION TO RELEASE FUNDS: The jury found the value of the airplane to be $80,000. It is undisputed that the parties each own an undivided one half separate property interest. The decree gave each party the option of purchasing the interest of the other party for $40,000. Mr. Walston exercised this option and placed that sum of money in the registry of the court to be paid to Mrs. Walston upon the occurrence of certain events. Although requested to release her interest in the Cessna, Mrs. Walston declines to do so and seeks to be paid the funds in the registry of the court without releasing her ownership interest. She takes the position that the family code has no application to this issue because the property issue is one of separate property and therefore § 9.007(c) does not apply to this issue.
>
> The Court declines to sign any order or authorize the release of the purchase money to Mrs. Walston until such time as she relinquishes her interest as would be necessary in any such exchange or purchase and sale transaction. The Court finds no legal grounds for the position taken by Mrs. Walston and that her refusal to release her interest in the Cessna is both arbitrary and capricious and constitutes an abuse of the judicial system. The result of this conduct is to deprive Mr. Walston of both his purchase money and the use of the airplane which he had the right to purchase. Nevertheless enforcement is prevented by Family Code § 9.007(c) and cases cited hereinabove.[3]

> The Court would urge the Court of Appeals in its wisdom to bring this portion of the case to a conclusion by: 1) order requiring Petitioner to sign the instruments attached hereto, or 2) referral for appropriate hearings concerning enforcement, sanctions and attorney fees, as their jurisdiction might permit.

Sue contends that the last paragraph constitutes a "plea on Larry's behalf" by the trial judge which is "a function of counsel." We disagree.

The trial judge clearly expressed his opinion that he agreed with Larry's position and disagreed with Sue's. Because this litigation has been ongoing since 1992, it is certainly understandable that the trial judge would have an interest in bringing it to a conclusion. We simply cannot agree that the judge "acted as counsel" for Larry by making the statements at issue. *See O'Connor*, 92 S.W.3d at 448. Thus, we overrule Sue's second issue.

Claims against Larry's Attorneys

Sue contends in her third issue that the court abused its discretion by sustaining the special exceptions filed by Larry's attorneys and dismissing her conspiracy claims against them.

Sue alleges in her sixth amended petition that Larry and his attorneys conspired to deprive her of her right to a hearing before an impartial tribunal, to deprive her of her right to a just and right division of the marital estate, to intentionally inflict severe emotional distress, and to impose duress on her. She makes the following factual allegations[4] to support her conspiracy claims:

(1) During the 1993 trial, one of Larry's

attorneys "participated in an improper *ex parte* communication with the trial judge";

(2) During the course of the 1994 appeal, one of Larry's attorneys "made false statements" to Sue's appellate counsel which prompted Sue's counsel to give "serious consideration to withdrawing from the case";

(3) The trial judge improperly "extended the receivership" to include the community assets located inside the Walstons' home and instructed the receiver to place those assets in storage at the request of the receiver and one of Larry's attorneys;

(4) One of Larry's attorneys assisted the receiver in preparing a false affidavit;

(5) One of Larry's attorneys contacted Sue's counsel before the July 1996 trial "and offered to pay her to withdraw from the case";

(6) Larry and one of his attorneys participated in an improper *ex parte* meeting with the trial judge on a Saturday in August 1996;

(7) One of Larry's attorneys filed a motion for release of funds from the court's registry supported by a false affidavit signed by Larry;

(8) Two of Larry's attorneys participated in an improper *ex parte* meeting with the elected trial judge, who later recused himself;

(9) One of Larry's attorneys had improper *ex parte* contact with the assigned trial judge;

(10) Larry's attorneys "knowingly and willfully participated in illegal acts and knowingly and willfully assisted and encouraged [Larry and the receiver] in the commission of illegal acts"; and

(11) Larry's attorneys conspired with Larry, the receiver, and the four district judges to deprive Sue of her rights by committing the acts listed above and by hiring a private investigator who followed Sue, observed her in her home, and sorted through her garbage.

Under Texas law however, an attorney generally has qualified immunity from suit by an opposing party for the attorney's conduct in the course of the litigation. *See Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405-06 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

> Texas case law has discouraged lawsuits against an opposing counsel if the lawsuit is based on the fact that counsel represented an opposing party in a judicial proceeding. An attorney has a duty to zealously represent his clients within the bounds of the law. In fulfilling this duty, an attorney has the right to interpose defenses and pursue legal rights that he deems necessary and proper, without being subject to liability or damages. If an attorney could be held liable to an opposing party for statements made or actions taken in the course of representing his client, he would be forced constantly to balance his own potential exposure against his client's best

> disputes through the court system and the attainment of justice. Thus, to promote zealous representation, courts have held that an attorney is "qualifiedly immune" from civil liability, with respect to non-clients, for actions taken in connection with representing a client in litigation. . . . .
>
> [However, a]s the Texas Supreme Court observed in *McCamish*, a lawyer's protection from liability arising out of his representation of a client is not without limits. For example, a cause of action could exist against an attorney who knowingly commits a fraudulent act outside the scope of his legal representation of the client. If a lawyer participates in independently fraudulent activities, his action is "foreign to the duties of an attorney." A lawyer thus cannot shield his own willful and premeditated fraudulent actions from liability simply on the ground that he is an agent of his client.

Id. (citing *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 793-94 (Tex. 1999) (quoting *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ) (other citations omitted)).

Sue's allegations are similar to those considered by the Dallas Court of Appeals in *Toles v. Toles*. 113 S.W.3d 899, 905-07 (Tex. App.—Dallas 2003, no pet.). That court observed that the policies behind the principles enunciated in *Alpert* and similar cases "are sound and vital to our adversary system of justice." *Id.* at 910.

> "An attorney should not go into court knowing that he may be sued by the other side [ ] for something he does in the course of representing his client; such a policy would favor *tentative* representation, not the

> *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect."

Id. (quoting *Bradt v. West*, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied)). Rather, "[a]n attorney's misconduct in litigation gives rise to remedies other than a separate action seeking damages from the attorney, which remedies are properly administered in the case in which the misconduct occurred." *Id.* at 911.

Sue argues that the alleged actions of Larry's attorneys are actionable because their actions are the type of "independently fraudulent activities" which are "foreign to the duties of an attorney." *See McCamish*, 991 S.W.2d at 793-94; *Alpert*, 178 S.W.3d at 406; *Toles*, 113 S.W.3d at 911; *Likover*, 696 S.W.2d at 472. We disagree. *See Alpert*, 178 S.W.3d at 406-08; *Toles*, 113 S.W.3d at 911-12. Accordingly, we overrule Sue's third issue.

Continuance Motions

Sue contends in her fourth issue that the court abused its discretion by denying her pretrial continuance motion and the oral continuance motion she made on the day of trial.

During a pretrial hearing on October 11, 2004, the court announced its intention to set the case for jury trial on Monday, December 6. Sue expressed concerns about this setting.

> [T]hat's a problem for me. I am free Monday and Tuesday, but Wednesday, Thursday and Friday—again, this is the week that the only person who can replace me is on vacation. She is out from December 1st through the 8th. I mean, I will arrange it if I have to; but it is my job.

Nevertheless, the court decided to set the trial for December 6 and signed a pretrial scheduling order[5] at the conclusion of the hearing setting various pretrial deadlines and setting the case for jury trial on December 6.

Sue filed a verified motion for continuance on December 1. She asked for the continuance because, "[d]espite due diligence," she could not be "ready to present her case on that date" because: (1) at the October 11 pretrial hearing, the court denied her request for release of funds in the court's registry; (2) she had not had sufficient time to conduct necessary legal research in response to the court's November 15 granting of the special exceptions filed by Larry's attorneys and the summary judgment filed by the receiver; (3) she had not had sufficient time to conduct necessary legal research and prepare documents necessary for presentation of her case; and (4) the court had previously granted "numerous continuances" requested by Larry but denied previous continuances requested by herself. Sue further explained in the affidavit supporting her motion that, because of her work schedule, she is generally able to perform legal research only on weekends at the Baylor law library and that she was required to work extra hours during the week before trial.

The court denied Sue's continuance motion the same day it was filed.

The denial of a continuance motion is reviewed under an abuse-of-discretion standard. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004); *In re Z.A.T.*, 193 S.W.3d 197, 208 (Tex. App.—Waco 2006, pet. denied). Generally, "the denial of a motion for continuance based on lack of time to prepare for trial is not an abuse of discretion." *Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 577 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *accord Clemons v. State Farm Fire & Cas. Co.*, 879 S.W.2d 385,

394 (Tex. App.—Houston [14th Dist.] 1994, no writ). Therefore, the court did not abuse its discretion by denying Sue's written continuance motion.

Sue also contends that the court abused its discretion by denying her oral continuance motion on the day of trial.[6] Sue's oral continuance motion did not comply with Rule of Civil Procedure 251. *See* TEX. R. CIV. P. 251; *Z.A.T.*, 193 S.W.3d at 208. Therefore, the court did not abuse its discretion by denying this motion. *See Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *Z.A.T.*, 193 S.W.3d at 208.

Accordingly, we overrule Sue's fourth issue.

Central Transportation Systems

Sue contends in her fifth issue that the award of damages to Central Transportation Systems is not supported by the verdict, the pleadings, the law, or the evidence.[7]

The receiver retained Central Transporation in 1995 to transport and store the Walstons' household goods and furnishings, and those assets have been in storage ever since. In the second divorce decree (signed in August 1996), the court ordered as part of the division of the marital estate that each party pay "1/2 of any and all debts or charges being unpaid incurred by virtue of the storing of the furniture and personal property." In the third divorce decree (signed in February 2002), the court ordered that Central Transportation's fees be paid from funds in the court's registry.

After this Court reversed the third divorce decree, Central Transportation intervened in the divorce proceedings. Central Transportation alleged in its first amended plea in intervention that it "is entitled to payment of the amounts owing to it as set forth above from the estate of the Petitioner and Respondent and declaratory relief

regarding the obligations of the parties and Intervenor in this matter." Central Transportation alleged in the alternative that it was entitled to: (1) judgment against the Walstons, jointly and severally, for its charges and expenses; and/or (2) declaration and foreclosure of a warehousemen's lien. Central Transportation also requested attorney's fees.

The jury found that: (1) Central Transportation had an agreement with the receiver, who was acting on the Walstons' behalf, to transport and store their personal property; (2) the Walstons owe Central Transportation $35,013 for the transport and storage of the property; (3) Central Transportation performed "compensable work" for the Walstons with a reasonable value of $1,604; and (4) Central Transportation was entitled to attorney's fees of $5,000 for trial, $10,000 for an appeal to this Court, and $2,500 for an appeal to the Supreme Court.

Because Central Transportation offered a remittitur, the court awarded damages of $34,446 for transportation and storage fees and awarded trial and appellate attorney's fees in the amounts found by the jury. The court also declared that Central Transportation has "a valid and subsisting possessory lien on the personal property of Petitioner and Respondent." After judgment, Central Transportation was paid these transportation and storage fees and its trial attorney's fees from the registry of the court. The court's decree addressed the future storage of the items held by Central Transportation as follows:

> Intervenor is under no further obligation from the Court to store the property, and in the event the parties do not agree on further storage or the claiming or disposition of the goods within sixty days from the date this judgment is signed, Intervenor may dispose of the goods by public or private sale of

> such sale, any sums of money, over the amount due of the storage and attorneys fees and costs collected at the sale, if any, shall be given to Petitioner and Respondent in equal portions.

Sue argues that Central Transportation's pleadings do not support this portion of the court's decree. We disagree.

Central Transportation's first amended plea in intervention requests "declaratory relief regarding the obligations of the parties and Intervenor in this matter." Its prayer for relief specifically asks the court for:

> judgment against Petitioner and Respondent, jointly and severally, for any and all unpaid storage charges, interest and expenses presently existing or which may arise in the future due and owing Intervenor for the storage of Petitioner and Respondent's personal property; [and] that it have declaratory relief setting forth the obligations of the parties and Intervenor regarding continued storage of the property; that a lien be declared and/or foreclosed upon an a judgment for the deficiency, if any, be entered against Petitioner and Respondent, jointly and severally.

Therefore, Central Transportation's pleadings support the judgment in this regard.

Sue next contends that the evidence does not support the award of damages to Central Transportation. However, Sue failed to pay the reporter's fee for preparation of a transcription of the trial.[8] *See* TEX. R. APP. P. 37.3(c)(2). In the absence of this portion of the reporter's record, we must presume that the evidence supports the judgment. *See Sam Houston Hotel, L.P. v. Mockingbird Rest., Inc.*, 191 S.W.3d 720, 721 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *In re Guardianship of Berry*, 105 S.W.3d 665, 667

(Tex. App.—Beaumont 2003, no pet.); *In re L.C.H.*, 80 S.W.3d 689, 691 (Tex. App.—Fort Worth 2002, no pet.); *In re Marriage of Spiegel*, 6 S.W.3d 643, 646 (Tex. App.—Amarillo 1999, no pet.).

Sue next contends that Central Transportation is not entitled to judgment as a matter of law[9] because: (1) the receiver was acting as the agent of the trial court and not the Walstons; and (2) Central Transportation alleged that it had a contract and offered that contract in evidence, which precludes a recovery in quantum meruit.

Sue relies on this Court's holding in *Spigener v. Wallis* for the proposition that, as a matter of law, the receiver could not enter a contract which was binding on the Walstons. 80 S.W.3d 174 (Tex. App.—Waco 2002, no pet.). In *Spigener*, we unequivocally stated, "The receiver is the agent of the trial court, not the owners." *Id.* at 183 (citing *Payne v. Snyder*, 661 S.W.2d 134, 143 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.)). However, it would have been more accurate for us to say that "*generally* [the receiver] is the agent of the appointing court and not the agent of the owner whose property is placed in his charge." *Payne*, 661 S.W.2d at 143 (emphasis added) (citation omitted).

The issue in *Spigener* was whether the receiver had "acted as 'counsel for plaintiffs'" (and presumably to the defendant's detriment) in selling the real property in dispute. *See Spigener*, 80 S.W.3d at 183. This Court concluded that the receiver had not so acted. *Id.* at 183-84. Nevertheless, in taking possession of property which is the subject of litigation, a receiver necessarily takes some actions as a representative of the property owners, who are generally on opposing sides in the litigation. *See Alpert v. Gerstner*, No. 01-05-418-CV, 2006 WL 2523028, at *12 (Tex. App.--Houston [1st Dist.] Aug. 31, 2006, pet. filed); *Payne*, 661 S.W.3d at 143; *see also Ex parte Britton*, 127 Tex. 85, 92

S.W.2d 224, 226 (1936) ("Generally speaking, a receiver is an arm of the court. He represents the court and all the parties interested in the litigation wherein he is appointed.").

If the evidence warrants, a factfinder may be asked to determine whether a receiver has acted as an agent for the parties. *See, e.g., Payne*, 661 S.W.2d at 143-44. Here, such a question was submitted, and the jury found that Central Transportation agreed with the receiver, who was acting on the Walstons' behalf, to transport and store their personal property. We must presume that the evidence supports this finding. *See Sam Houston Hotel*, 191 S.W.3d at 721; *Berry*, 105 S.W.3d at 667; *L.C.H.*, 80 S.W.3d at 691; *Spiegel*, 6 S.W.3d at 646.

Sue also contends that Central Transportation is not entitled to judgment as a matter of law because it pleaded and proved that it had a contract, which precludes a recovery in quantum meruit. Sue is correct that a litigant generally may not recover in quantum meruit if there is a contract which is enforceable against the party from whom the litigant seeks to recover. *See Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990); *Jones v. Blume*, 196 S.W.3d 440, 451 (Tex. App.—Dallas 2006, pet. denied); *Double Diamond, Inc. v. Hilco Elec. Co-op.*, 127 S.W.3d 260, 268 (Tex. App.—Waco 2003, no pet.). Here, however, the jury found that the receiver reached the agreement with Central Transportation on behalf of the Walstons.

"Texas law has long recognized that nonparties may be bound to a contract under various legal principles." *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005) (orig. proceeding). One of these legal principles arises when a party to the contract is acting on behalf of another. *See id.* at 131 n.15 (citing *Biggs v. U.S. Fire Ins. Co.*, 611 S.W.2d 624, 629 (Tex. 1981)); *see also Builders Transp., Inc. v.*

Grice-Smith, 167 S.W.3d 1, 12 (Tex. App.—Waco 2005, pet. denied) (agents actions are binding on principal when agent acts with actual or apparent authority).

Here, the jury found that the receiver was acting on the Walstons' behalf when he reached an agreement with Central Transportation to transport and store their personal property. There is nothing in the judgment to indicate that the court awarded damages to Central Transportation on anything other than a contract theory. Therefore, Sue's arguments with regard to quantum meruit are without merit.

Accordingly, we overrule Sue's fifth issue.

Disbursement of Funds in Registry

Sue contends in her sixth issue that the district clerk's reliance on section 117.054(b) of the Local Government Code to withdraw a percentage of funds from the court's registry violated her right to due process.

Section 117.054 provides:

> (a) If a special or separate account earns interest, the clerk, at the time of withdrawal, shall pay in a manner directed by a court with proper jurisdiction the original amount deposited into the registry of the court and any interest credited to the account in the manner calculated in Subsection (b).
>
> (b) The interest earned on a special account or a separate account shall be paid in the following amounts:
>
> (1) 10 percent of the interest shall be paid to the general fund of the county to compensate the county for the accounting and administrative expenses of

maintaining the account; and

(2) 90 percent of the interest shall be credited to the special or separate account.

TEX. LOC. GOV'T CODE ANN. § 117.054 (Vernon 1999).

When the judgment was signed, approximately $41,000 in community funds remained in the registry. The court decreed that Central Transportation be paid $39,446 from these funds. The court also ordered that funds from the registry be used to pay an $800 bill for Sue's federal income taxes arising from interest earned on the funds in the registry, to the extent that any funds remained after Central Transportation was paid. The remainder of funds on deposit, if any, after these items were paid was to be divided equally between the Walstons.

The district clerk paid Central Transportation in accordance with the terms of the decree. The clerk then notified the parties that there remained a balance of $2,215 in community funds in the registry.[10] However, after the clerk deducted ten percent of the interest earned in accordance with section 117.054(b) (which amounted to $2,556), there were no community funds remaining with which to pay the IRS. Thus, the clerk advised that the remainder of the ten percent owed ($341) would be taxed as court costs and that no check would issue for payment of Sue's IRS bill.

Sue contends that the clerk erroneously calculated the percentage by basing it on the amount of interest earned on all of the Walstons' funds in the court's registry between 1996 and 2005 rather than on the $41,000 which was on deposit when the clerk paid Central Transportation.

A review of the balance sheet documenting deposits and withdrawals of the Walstons' community funds in the court's registry reveals that the account earned $25,557 in

interest between 1996 and 2004.[11] The balance sheet reflects that the original amount of funds placed in the registry was $211,166 and that Larry and Sue withdrew $195,516 between 1996 and 2004 for various reasons. Thus, only $15,650 of the original funds remained from which the $39,446 to Central Transportation was to be paid, and the clerk had to use about $23,800 of the interest earned to pay this obligation.

Under the plain language of section 117.054, the clerk had a statutory duty to retain ten percent of the interest earned on the Walstons' community property funds deposited in the court's registry. *See* TEX. LOC. GOV'T CODE ANN. § 117.054(b)(1) ("10 percent of the interest *shall* be paid to the general fund of the county") (emphasis added); *see also* TEX. GOV'T CODE ANN. § 311.016(2) (Vernon 2005) ("'Shall' imposes a duty"). And because subsection (b)(1) is designed "to compensate the county for the accounting and administrative expenses of maintaining the account," the statute necessarily contemplates that the county be compensated for the entire time period during which the account is maintained. Thus, the clerk properly calculated the percentage to be retained based on the interest earned on all of the Walstons' community funds deposited in the registry rather than the amount attributable to only those funds remaining at the time of judgment.

Nevertheless, Sue contends that this denies her right to due process because: (1) she "finds no provision in the applicable statutes authorizing the district clerk to determine whether Central Transportation, attorneys for Central, McLennan County or Appellant has the superior claim to funds held by her office"; (2) "no constitutional provision or statute confers upon a district clerk the authority to divide community property"; and (3) her property was "taken" by the clerk without an opportunity to

be heard.

Regarding Sue's first two contentions, the district clerk has disbursed funds from the registry during the course of litigation in compliance with section 117.121 of the Local Government Code and only when ordered to do so by the trial court. *See* TEX. LOC. GOV'T CODE ANN. § 117.121 (Vernon Supp. 2006). In the decree, the court specifically ordered the clerk to pay the monies owed to Central Transportation before paying Sue's IRS bill and expressly recognized in the decree that there may not be sufficient funds remaining to pay the IRS bill.

Finally, we conclude that Sue's right to due process has not been denied because of any lack of opportunity to be heard. Sue makes no complaint regarding the $195,516 in disbursements which were made from the registry throughout the course of this litigation before judgment.[12] Those disbursements left only $15,650 of the original balance to pay the monies owed Central Transportation. In the end, the Walstons' liabilities exceeded the amount of community funds on deposit in the court's registry. The court did not abuse its discretion, nor was Sue's right to due process violated, by the order in which the court determined that the Walstons' creditors should be satisfied. *See Lifshutz v. Lifshutz*, 199 S.W.3d 9, 18 (Tex. App.—San Antonio 2006, pet. denied) (trial court has broad discretion in dividing community estate); *Fischer-Stoker v. Stoker*, 174 S.W.3d 272, 277 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (same); *Beard v. Beard*, 49 S.W.3d 40, 66 (Tex. App.—Waco 2001, pet. denied) (same).

Accordingly, we overrule Sue's sixth issue.

Division of Community Estate

Sue contends in her seventh issue that the court failed to divide the community estate in a just and right manner. *See* TEX. FAM. CODE ANN. § 7.001 (Vernon

2006). In the absence of a reporter's record, however, we must presume that the evidence supports the court's decision. *See Sam Houston Hotel*, 191 S.W.3d at 721; *Berry*, 105 S.W.3d at 667; *L.C.H.*, 80 S.W.3d at 691; *Spiegel*, 6 S.W.3d at 646. Therefore, we overrule Sue's seventh issue.

Jury Charge on Conspiracy

Sue contends in her eighth issue that the question in the charge regarding her conspiracy claim is erroneous. Because Sue contends that the conspiracy question was defective as submitted, a contemporaneous objection to submission of that question would suffice to preserve error. *See Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003); *Religious of the Sacred Heart of Tex. v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex. 1992); *Builders Transp.*, 167 S.W.3d at 13. We have no record that Sue objected to the question as submitted. In the absence of a reporter's record, we will presume that she did not. *See NCAA v. Yeo*, 114 S.W.3d 584, 593-94 (Tex. App.—Austin 2003), *rev'd on other grounds*, 171 S.W.3d 863 (Tex. 2005).

A party may also preserve a complaint regarding an error in the charge by tendering a written request to the trial court for submission of the desired question in substantially correct wording. TEX. R. CIV. P. 278; *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002); *Gerdes v. Kennamer*, 155 S.W.3d 523, 534 (Tex. App.—Corpus Christi 2004, pet. denied). Here, however, there is nothing in the record to show that Sue tendered such a request before the charge was submitted to the jury. One way to make a record demonstrating that a proper request has been tendered is to have the trial court endorse on the tendered request that it was "refused." *See* TEX. R. CIV. P. 276; *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386 (Tex. 1997) (per curiam). However, this is not the exclusive means for preserving such errors. *See Dallas*

Market Ctr. Dev. Co., 958 S.W.2d at 386.

More than five months after the signing of the judgment, Sue filed an application to make a bill of exceptions to supplement the record with the questions she alleges she "requested the Court to give" to the jury but which the court refused. In a hearing on several post-judgment matters including the application for bill of exceptions, the court denied Sue's application and stated essentially that it would rely on the trial record to demonstrate whether appropriate requests and objections were made. The court later signed an order denying the application, stating in pertinent part, "The Court will rely on the trial record and not unsigned, unfiled suggestions purporting to have been submitted to the Court and presented in this application some seven months later." *Cf. id.* at 385-86 (error preserved where trial court stated on record in post-judgment proceeding that requested questions had been properly submitted and apologized for not endorsing requests with ruling made).

For the foregoing reasons, we hold that Sue failed to properly preserve this issue for appellate review. Thus, we overrule Sue's eighth issue.

We affirm the judgment.

FELIPE REYNA
Justice

Before Justice Vance,
Justice Reyna, and
Judge Scoggins[13]
Affirmed
Opinion delivered and filed May 9, 2007
[CV06]

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[1] *See Walston v. Walston*, 119 S.W.3d 435 (Tex. App.—Waco 2003, no pet.); *Walston v. Walston*, 971 S.W.2d 687 (Tex. App.—Waco 1998, pet. denied); *Walston v. Walston*, No. 10-94-169-CV (Tex. App.—Waco June 14, 1995, writ denied) (not designated for publication); *see also In re Walston*, No. 10-05-421-CV, 2006 WL 301107 (Tex. App.—Waco Feb. 8, 2006, orig. proceeding) (mem. op.) (per curiam); *Walston v. Stewart*, No. 10-05-135-CV, 2005 WL 3072919 (Tex. App.—Waco Nov. 16, 2005, pet. denied) (mem. op.) (per curiam); *In re Walston*, No. 10-05-259-CV, 2005 WL 2787651 (Tex. App.—Waco Oct. 26, 2005, orig. proceeding) (mem. op.); *Walston v. Lockhart*, No. 10-03-183-CV, 2005 WL 428433 (Tex. App.—Waco Feb. 23, 2005, pet. denied) (mem. op.); *In re Walston*, No. 10-04-354-CV, 2004 WL 2830871 (Tex. App.—Waco Dec. 6, 2004, orig. proceeding) (mem. op.); *In re Walston*, No. 10-04-330-CV, 2004 WL 2616317 (Tex. App.—Waco Nov. 13, 2004, orig. proceeding) (mem. op.) (per curiam); *Walston v. Lockhart*, 36 S.W.3d 278 (Tex. App.—Waco 2001, order), *disp. on merits*, 62 S.W.3d 257 (Tex. App.—Waco 2001, pet. denied) (per curiam).

[2] The court found that Central Transportation is entitled to $34,446 for transportation and storage fees because Central Transportation offered a remittitur of $567 against the jury's finding of $35,013.

[3] *In re Fischer-Stoker*, 174 S.W.3d 268 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *English v. English*, 44 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

[4] Sue's petition actually contains at least eighteen separate factual allegations supporting her conspiracy claims against Larry, his attorneys, the receiver, and the four trial judges who have presided over various stages of this litigation. We recite here only those allegations pertinent to Larry's attorneys.

[5] This pretrial order also addressed several motions which were pending at the time.

[6] Sue states in her brief that she also made "multiple requests for continuance, postponement or even for early recess so that she might have time to prepare for presentation of evidence," which were all denied during the course for the trial. However, because Sue failed to pay for the reporter's record, we have no record of these "multiple requests."

[7] To be more precise, Sue argues that the award of damages to Central Transportation is erroneous because: (a) there is no evidence or factually insufficient evidence to support the award; (b) the court erroneously applied the doctrine of *quantum meruit* and abused its

discretion by requiring Sue to pay any debt owed Central Transportation; (c) the judgment is not supported by the verdict and findings; and (d) the court erroneously granted relief not requested.

[8] Sue did pay the court reporter to prepare a limited reporter's record which includes some pretrial matters and a postjudgment hearing.

[9] We may address questions of law even if we do not have a trial record. *In re L.C.H.*, 80 S.W.3d 689, 691 (Tex. App.—Fort Worth 2002, no pet.).

[10] The court's registry also contains $40,000 in Sue's separate property funds which Larry tendered to purchase her one-half interest in the Cessna. However, those funds have not been released to Sue because she has refused to sign documents: (1) disclaiming any interest in the Cessna; and (2) transferring her ownership interest to "Larry Walston d/b/a Walston Aviation."

[11] The funds earned additional interest in 2005 before the certificates of deposit in which the funds had been invested were cashed out. However, the precise amount of interest earned in 2005 is not clear from the balance sheet.

[12] Of those disbursements, Larry received $144,154 and Sue received $51,362.

[13] The Honorable R. Al Scoggins, Jr., Judge of the 378th District Court of Ellis County, sitting by assignment of the Chief Justice of the Supreme Court of Texas pursuant to section 74.003(h) of the Government Code. *See* TEX. GOV'T CODE ANN. ' 74.003(h) (Vernon 2005).

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 07-0645 DATE: 11/30/2007
COA #: 10-05-00193-CV TC#: 92-3724-1

STYLE: SUE WALSTON
v. LARRY WALSTON, WILLIAM V. DUNNAM, JR., C. VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP, AND CENTRAL TRANSPORTATION SYSTEMS

Today the Supreme Court of Texas denied the petition for review as redrafted in the above-referenced case.

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 07-0645 DATE: 2/29/2008
COA #: 10-05-00193-CV TC#: 92-3724-1

STYLE: SUE WALSTON
v. LARRY WALSTON, WILLIAM V. DUNNAM, JR., C. VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP, AND CENTRAL TRANSPORTATION SYSTEMS

Today the Supreme Court of Texas denied the motion for rehearing in the above styled and numbered case.

07-0645

IN THE
SUPREME COURT OF TEXAS

SUE WALSTON

Petitioner

Vs.

LARRY WALSTON, WILLIAM V. DUNNAM, JR., C.VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP, AND CENTRAL TRANSPORTATION SYSTEMS

Respondents

Appellate Cause No. 10-05-00193-CV
From the Tenth District Court of Appeals at Waco

Trial Cause No. 92-3724-1
From the 19th Judicial District Court
Waco, McLennan County

PETITION FOR REVIEW

SUE WALSTON
Petitioner
3231 Ferndale Drive
Waco, TX 76706
Telephone:254.662.2270
Facsimile: Same

To avoid unnecessary volume, state supreme court formatting requirements and tables have been omitted, and only issues presented and argument are reproduced here.

ISSUES AND ARGUMENT

ISSUE ONE

The appellate court lacked jurisdiction to consider this appeal where the trial judgment is not final.

SUMMARY OF THE ARGUMENT

The Court's jurisdiction is generally limited to final judgments and the Fourth Amended Divorce Decree in the underlying case is not final where it is incomplete, indefinite and uncertain, despite other indications or presumptions that it is so. Moving forward in determination of the appeal was fundamental error on the part of the appellate court.

ARGUMENT

Ordinarily a court may presume that a judgment is final when it is entered after a conventional trial, is labeled "final," and includes a statement that all relief not granted is denied. However, this presumption only applies in the absence of a contrary showing in the record. *Exxon Corp. v. Garza*, 981 S.W.2d 415, 419-420 (Tex.App.–San Antonio 1998) *n.w.h.*

After a conventional jury trial, the court entered its "Fourth Amended Divorce Decree" which includes a "Mother Hubbard" clause specifically denying any relief not granted therein. (11/05-II CR at 226-241, and **Tab 2**). Petitioner filed a timely motion for new trial (11/05-II CR at 256-264) which was denied after hearing, then filed the underlying appeal. All parties have treated the Fourth Amended Divorce Decree as a final judgment.

In response to the pleadings of both Sue and Larry Walston, the judgment purports to partition a

Cessna 414 aircraft owned by the parties as tenants-in-common. (11/05-II CR at 229-232, and **Tab 2**). The Tenth Court of Appeals previously determined that the parties each own a 50% separate property interest in the aircraft and both parties pleaded for partition and distribution of their separate property interest. Pursuant to provisions in the decree, Larry opted to purchase Sue's one-half interest in the aircraft by depositing $40,000 into the registry of the court. (11/05-II CR at 275-276). By implication, the funds are presumed to be her separate property, but there is no provision in the decree for a right of ownership or for distribution of the $40,000 to Sue.

After perfecting the underlying appeal, Sue moved for release of the funds to her and hearing was set for June 30, 2005. (11/05-II CR at 304-307). Larry moved to block the release of funds by filing a separate petition set for hearing on the same day, complaining that partition of the aircraft cannot be accomplished without execution by Sue of a blanket Disclaimer of Interest and Bill of Sale for the purpose of filing with the Federal Aviation Authority. That petition became the subject of original proceeding No. 10-05-00259-CV, *In re Sue Walston,* in which Sue complained that she had not been served with the petition that was set for hearing. The Tenth Court ordered temporary prohibition of any trial court proceedings on the separate petition; however, in his Post-Judgment Findings and Orders, the trial judge found that Sue's refusal to sign and swear to the Disclaimer of Interest and Bill of Sale attached to the orders is arbitrary and determined that distribution of her separate property is contingent upon execution by her of those documents. (11/05-II CR at 365-361 and **Tab 5**). Sue complained that the documents Larry is asking her to sign and swear to contain false

information and she reiterates here that she will ***never*** sign them. (6/06 RR at 21-25 and 32-33).

Where the judgment is silent with respect to the obligation of any further actions by Sue for release of Larry's $40,000 payment to her, but the trial judge has expressed his intention that final partition of the aircraft is contingent upon actions which may never – in this case **will never** – occur, ambiguity exists. The Fourth Amended Divorce Decree cannot be final if it is incomplete, indefinite and uncertain, despite other indications or presumptions that it is so. *Pinchin v. Kinney*, 623 S.W.2d 783, 787-788 (Tex.App.–Austin, 1981) *n.w.h.* Although orders within the judgment purport to partition the aircraft, the judgment fails to particularly determine all the rights and obligations of the parties with reference to final partition if both parties are ultimately left in the same position as before trial. In this case, Larry is still in possession of an aircraft of which he says he cannot dispose to his advantage without further adjudication by the trial court of his rights and Sue is still denied the use and enjoyment of property in which she claims an interest without further adjudication by the trial court of her rights and potential obligations. The issue here is one of partition and not of divorce and so it is not subject to any provisions of the family code which might allow for further orders in aid of division. *Brandon v. Brandon*, 692 S.W.2d 528, 530 (Tex.App. 5 Dist. 1985, *n.w.h.*).

Judge Koons wrote in his Post Judgment Findings and Orders:

> "The Court would urge the Court of Appeals in its wisdom to bring this portion of the case to a conclusion by: 1)

> order requiring Petitioner to sign the instruments attached hereto, or 2) referral for appropriate hearings concerning enforcement, sanctions and attorneys fees, as their jurisdiction might permit." (11/05-II CR at 356-357 and **Tab 5**).

If further orders or actions by the appellate court are necessary to bring any portion of a case to a conclusion, then the trial judgment cannot be conclusive.

Prior to filing of the record, Sue moved for abatement of the appeal based on her belief that the trial judgment is not final. That motion was denied and she addressed the issue in her appellate brief. The appellate court determined very briefly that:

> "Sue contends in her first issue that this Court does not have jurisdiction because the judgment is too indefinite and uncertain to constitute a final judgment. She argues that the judgment is too indefinite because disputes remain about what documentation she must sign before Larry's purchase of her one-half separate property interest in the Cessna can be effectuated. We disagree.
>
> "After a full trial on the merits, the statement in a judgment that all relief not requested is denied signifies finality." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 201 (Tex. 2001). The judgment in this case has such a statement, and "there is nothing to

> indicate that the trial court did not intend to finally dispose of the entire case." *Moritz v. Preiss*, 121 S.W.3d 715, 719 (Tex. 2003). Accordingly, we overrule Sue's first Issue." **(Tab 1)**.

Lehmann and *Moritz* address the issue of finality of summary judgments, but in *Hinde v. Hinde*, this Court addressed the issue of certainty of rights and obligations as affecting finality. A final judgment fully disposes of all issues and all parties in the lawsuit, but a judgment must also be sufficiently definite and certain to define and protect the rights of all litigants, or it must provide a definite means of ascertaining such rights, to the end that ministerial officers can carry the judgment to execution without ascertainment of facts not therein stated. *Hinde v. Hinde*, 701 S.W.2d 637, 638-639 (Tex. 1985). In this case, no obligation is imposed upon Sue by the Fourth Amended Divorce Decree before she, presumably, is entitled to the $40,000, but neither is the $40,000 placed in the registry of the court specifically awarded to her. The clerk cannot distribute those funds without further instruction from the court, and the trial judge has indicated his intention that no funds be released to Sue until she signs the bill of sale and blanket disclaimer provided by Larry.

At issue here is the construction of finality of judgments as it affects jurisdiction.

IN THE ALTERNATIVE, if the trial judgment is final, Petitioner complains of the following:

ISSUE TWO

The Fourth Amended Decree of Divorce is a nullity where the trial judge is constitutionally disqualified from adjudicating a case in which he acted as a participant.

SUMMARY OF THE ARGUMENT

When Judge Koons advocated on Larry Walston's behalf that the appellate court order Sue to sign instruments provided by Larry or refer the issue for hearing concerning enforcement, sanctions and attorneys fees if she refused to sign, he stepped over the line that separates an impartial trier of fact from attorneys participating in a case and became a participant in the suit. A judge is expressly disqualified under the state constitution from ruling in any case in which he participated or served as counsel and any act by a disqualified judge is a nullity.

ARGUMENT

Article 5 § 11 of the TEXAS CONSTITUTION reads in part:

> "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, whether by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case." *Vernon's Annotated Constitution of the State of Texas, Article 5 § 11, 1993.*

The term "counsel" as used in the State Constitution, means an advocate, counselor, or pleader, one who assists his client with advice and

pleads for him in open court. *Coyle v. State*, 775 S.W.2d 843, 845 (Tex.App.–Dallas 1989, *n.w.h.*).

During the June 30, 2005, hearing on Sue's motion for release of the $40,000 held in the registry of the court which was presumed to be her separate property, and contrary to the Tenth Court's stay order in original cause 10-05-0259-CV prohibiting the trial court from hearing Larry's Petition for Enforcement of Property Division until further notice from the court, Judge Koons considered the petition, disregarded Sue's argument that the documents Larry was requesting that she sign were untrue or factually incorrect and that, in signing and swearing to those documents, she would be committing perjury before a federal agency, and, in his Post Judgment Findings and Orders, advocated on Larry's behalf:

> "The Court would urge the Court of Appeals in its wisdom to bring this portion of the case to a conclusion by: 1) order requiring Petitioner to sign the instruments attached hereto, or 2) referral for appropriate hearings concerning enforcement, sanctions and attorneys fees, as their jurisdiction might permit." (11/05-II CR at 356-361 and **Tab 5**).

The instruments attached to the findings/orders are the identical documents attached to Larry's petition which the court was prohibited from hearing.

The appellate court contends that the trial judge was merely expressing "his opinion that he agreed with Larry's position and disagreed with Sue's:" (**Tab 1**). But an opinion is a view, judgment

or appraisal formed in the mind about a particular matter. Pleading, on the other hand, is advocacy of a cause in a court of law.[1] Judge Koons' sincere entreaty that the appellate court order Sue to sign documents provided by Larry and order that she be referred back to the trial court for hearings to enforce such orders or face sanctions if she refused to sign transformed the trial court from an impartial arbiter to a participant in the case.

Judge Koons' pleading on Larry's behalf affirmatively appears in the record. The Court is not required to investigate the extent of the services of one who performs acts in the capacity of counsel. *Gaines v. Hindman*, 74 S.W. 583 (Civ.App. 1903). Doubt regarding disqualification of a judge should be resolved in favor of disqualification rather than for qualification. The acts of judges subject to any constitutional disqualification are void. *Lindsley v. Lindsley*, 152 S.W.2d 415, 432 (Civ.App.–Dallas 1941, *rev'd on other grounds*).

This issue questions the extent to which a judge may participate in a case before the constitutional provision for disqualification is evoked.

ISSUE THREE

Appellate courts have determined that attorneys have qualified immunity from suit by an opposing party for their conduct in the course of litigation. Does this qualified immunity extend to bar claims of damage caused by conspiracy with judges acting under color of state law?

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1 Webster's Collegiate Dictionary, Copyright 2006 by Merriam-Webster, Incorporated

SUMMARY OF THE ARGUMENT

There is no statutory support for the ruling in this case that Petitioner's claims against opposing attorneys are barred as a matter of law.

ARGUMENT

Sue joined the Dunnams who represented Larry Walston during the course of the underlying divorce action as co-respondents in her Fifth Amended Original Petition, alleging causes of action in tort. (11/05 CR at 90-116). The Dunnams filed special exceptions claiming that all of the acts of which Sue complained constituted litigation conduct and that Texas law does not permit a litigant to sue her adversary's attorneys for litigation conduct. It is the position of co-respondents that, even if these attorneys were guilty of the actions of which they were accused, this conduct, even if illegal, is subject only to sanctions by the court. (11/05 CR at 121-128).

The trial judge sustained the special exceptions and dismissed all claims against the Dunnams in his Pretrial Findings and Orders on November 15, 2004. (11/05 CR at 149-153).

Sue claims that Larry Walston and his attorneys conspired with several presiding judges of this case for the purpose of depriving her of her right under the 14th Amendment to the UNITED STATES CONSTITUTION to hearing by a tribunal which is, and which appears to be, impartial by initiating and participating in improper *ex parte* communications regarding the case and that, as a result of their actions, she was injured. While Larry and the Dunnams may not be held liable for their own conduct under statutes prohibiting deprivations of constitutional rights under color of state law, they

may be held liable under those statutes if they conspired with persons who acted under color of state law. *Slavin v. Curry*, 574 F.2d 1256, 1265 (5th Cir. 1978). Judges enjoy absolute immunity for their actions, however wrongful or malicious in nature; but those who conspire with them are not protected from the consequences of their actions by the same immunity. The Dunnams claim that communications with the court regarding this litigation (*ex parte* or not) clearly constitute "litigation conduct" in furtherance of their client's interests; however, they have not cited any authority for this extension of the definition of communication with the court. Nor did the appellate court cite any authority for such an extension in its opinion.

This issue involves the validity of the non-statutory extension of absolute immunity to attorneys.

ISSUE FOUR

If, as a matter of law, a party to a partition suit in which a receiver was appointed by the court lacks standing to file a collateral action against third parties to a contract with the receiver, then do third parties to contracts with the receiver lack standing to proceed in a collateral action against original parties to the partition suit on issues surrounding the contract? If, as a matter of law, a contractor with the receiver lacks standing to proceed in a collateral action on issues surrounding that contract, then does the doctrine of election of remedies permit recovery in *quantum meruit* in a collateral proceeding?

SUMMARY OF THE ARGUMENT

Because Central Transportation lacks

tanding to complain in Petitioner's collateral divorce proceeding of failure of the receiver in a separate partition suit to arrange for payment of storage fees, the money judgment for Central based on the contract issue submitted to the jury is void and the doctrine of election of remedies does not entitle Central to recover on the *quantum meruit* issue in the collateral divorce proceeding where there is evidence of a contract with the receiver for the services performed.

ARGUMENT

In 1994, during the pendency of Sue's appeal of the first Final Decree of Divorce in the underlying trial case, Larry filed a separate partition suit requesting that the court appoint a receiver to sell the parties' marital home and divide the proceeds pursuant to the terms of the appealed decree. Over Sue's objection, the court ordered a receiver to sell the home, take possession of the parties' undivided personal property located at the home and to place that personal property in the hands of Central Transportation Systems for storage. After the sale of her home, the appellate court reversed and remanded the divorce case and determined that Sue's consolidated appeal of the appointment of the receiver was moot where he was discharged prior to the appellate ruling.2

Sue filed suit in trespass to try title to recover her home from purchasers at the 1995, receiver's sale claiming that the sale was void because the receiver had sold the property after the order of sale expired where the contract for sale between the receiver and the purchasers, upon which the order was

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2 See 10-94-0169-CV and 10-94-0251-CV (11/96 CR at 3-25)

dependent, terminated prior to sale. The Tenth Court ruled that Sue lacked standing to complain in a collateral trespass to try title action because, as a matter of law, she was not a party to the contract between the receiver and the purchasers. The court determined that any complaint of a receiver's actions must be adjudicated in the court in which the receiver was appointed. *Walston v. Lockhart*, 62 S.W.3d 257-266 (Tex.App.–Waco 2002) *pet. denied, writ of certiorari denied.*

On remand from the Third Amended Decree of Divorce, Central intervened in the divorce suit asserting claims that Sue and Larry, jointly and severally, owed the facility for storage of their personal property pursuant to Central's storage agreement with the receiver because the receiver was acting for the parties when he made the agreement or, alternatively, that Sue and Larry, jointly and severally, owed Central for storage services rendered and accepted or that Central was entitled to a lien on the property still in its possession. (11/05-I CR at 140-143). Separate jury verdicts were entered for Central on issues of both the contract claim and the *quantum meriut* claim and the court entered money judgment for Central on the contract claim. **(Tab 3 and Tab 2).**

If, as a matter of law, Sue lacks standing to file a collateral suit against third parties to a contract with the receiver, then most certainly, as a matter of that same law, third parties to a contract with the receiver lack standing to complain in Sue's collateral divorce suit of the failure of the receiver to arrange payment for agreed services rendered in the partition proceeding. Standing is jurisdictional and, where the trial court lacked jurisdiction to hear

Central's contract claims, the money judgment for Central is void.

Where Central claims that there was an agreement with the receiver for the removal and storage of the Walstons' property, then as a matter of law Central is not entitled to recover in *quantum meruit* in the same proceeding. *Bado Equipment Co., Inc. v. Bethlehem Steel Corp.*, 814 S.W.2d 464, 473 (Tex. App. – Houston [14rh Dist.] 1991, n.w.h..). Petitioner finds no precedent that supports the election of the remedy of recovery in *quantum meruit* in a case between similar parties where the remedy of breach of contract is barred.

The appellate court denied Petitioner's Motion for Rehearing in which this issue of standing was raised. Standing is jurisdictional and may be raised at any time.

ISSUE FIVE

Whether the laws of Texas which permit state court judges at all levels to accept contributions for the purpose of defraying campaign costs and other expenses, and the rules of procedure promulgated by the Court which allow and encourage judges to participate in the determination of cases in which contributors have an interest conspired to violate Petitioner's due process right to hearing by a tribunal which is, and which appears to be, impartial as contemplated by the Fourteenth Amendment to the CONSTITUTION of the United States.

SUMMARY OF THE ARGUMENT

The appellate court's judgment denies Petitioner due process of law where justices of the court who have accepted – or who may have accepted

or still may accept – money from parties with an interest in the outcome of this case appear to have failed to hold the balance "nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1926).

ARGUMENT

Section 1 of the Fourteenth Amendment to the UNITED STATES CONSTITUTION provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A fair trial before an impartial tribunal is a basic requirement of due process and our system of law endeavors to prevent even the probability of unfairness. *In re Murchison*, 349 U.S. 133, 136 (1955). The Supreme Court of the United States has found that the requirement of neutrality "preserves both the appearance and reality of fairness" by "ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him". *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1979). The Court has further determined that "every procedure which

would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" denies due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1926).

Article Five of the TEXAS CONSTITUTION provides that judges at all levels of the state judiciary be elected by qualified voters of the state and TEXAS ELECTION CODE TITLE 251 allows for acceptance of contributions for financing of election campaigns and support of officeholders and sets out contribution and expenditure limits. Judicial candidates and judicial officeholders are required to file with the Texas Ethics Commission periodic disclosure reports for the purpose of informing the public of how much and from whom contributions are accepted and how those contributions are expended.3

Disclosure reports filed with the Texas Ethics Commission indicate that Texas judges, including Texas Supreme Court justices, expend tens of thousands of dollars in non-election years to defray personal expenses.

In *Rogers v. Bradley*, then Texas Supreme Court Justice Enoch rationalized limitation of the scope of rules addressing recusal and disqualification by insisting that Texans know that judges must accept contributions to secure their elected seats and that any reasonable Texan should know that contributions are given with the expectation of consideration of the interests of contributors by elected officials. *Rogers v. Bradley*, 909 S.W.2d 872, 883 (Tex. 1995). Justice Enoch went on to explain that, "As long as judges are subject to any electoral

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3 Available from the year 2000 forward at www.ethics.state.tx.us/whatsnew/srchinfo.

process, our rules must be construed to encourage citizen involvement, not to chill it." *Id.* at 883.

Even if judges participating in a decision have never received contributions from an interested party, election laws and rules of procedure which allow those judges to accept future contributions from parties with an interest in the outcome of the proceedings create the presumption that they will do so and the Court's precedent opinions encourage them to rule in a manner that will encourage such contributions.

The laws that the State of Texas has enacted and enforces which allow judicial candidates and judicial officeholders to solicit and accept contributions from parties who may have an interest in proceedings before the court on which the candidates or officeholders will sit are in violation of Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the UNITED STATES CONSTITUTION where such laws force non-contributing litigants to bring their cases before judges whose decisions may be tainted, or may appear to be tainted, by consideration of a contributing party's interest in the outcome of the case. Where appellate judges participating in this case have a financial interest in the outcome of any case which involves the interest of a contributor the probability of actual bias on the part of the judges is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court grant this petition and review the case below. Petitioner prays for general

relief and for costs.

Respectfully submitted,

s/'Sue Walston
SUE WALSTON
Petitioner
3231 Ferndale Drive
Waco, TX 76706
Telephone: 254.662.2270
Facsimile: 254.662.2270

10-05-00193-CV

IN THE COURT OF APPEALS
TENTH DISTRICT
WACO, TEXAS

SUE WALSTON

Appellant

Vs.

LARRY WALSTON, WILLIAM V. DUNNAM, JR., C. VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP, and CENTRAL TRANSPORTATION SYSTEMS

Appellees

Trial Court Cause No. 1992-3724-1
From the 19th Judicial District Court
Waco, Texas

APPELLANT'S MOTION FOR RECUSAL OR DISQUALIFICATION

TO THE HONORABLE WILLIAM R. VANCE:

NOW COMES SUE WALSTON, Appellant and Movant herein, and in support of her motion would show:

The underlying case is a suit for divorce and property division to which third parties have been joined or have intervened.

The TEXAS ELECTION CODE provides that state judges may accept financial contributions to pay campaign expenses and to offset activity costs associated with judicial duties which are not reimbursed by the State. Judges are required to periodically disclose the source and use of such contributions; however, Appellant is entitled to enter any court in the United States unfettered by the undue burden of researching a judge's financial background and with the *presumption* that she will be heard by a tribunal which is, and which appears to be, impartial. The Supreme Court of Texas has determined that Texas judges have a pecuniary interest in soliciting contributions from parties with an interest in cases before the courts by finding that refusal of a judge to hear a case because he has accepted a contribution from a party with an interest in the outcome of that case would "chill" contributor participation and limit the amount of money available to enhance the lifestyles and ensure the reelection of those judges. *Rogers v. Bradley*, 909 S.W.2d 872, 883 (Tex. 1995). Where it is in Justice Vance's financial interest to protect and garner the good will of parties who have an interest in the outcome of the case, his participation in ruling on this case creates a reasonable question as to whether Appellant can receive a hearing which is, and which appears to be, impartial as contemplated by the Due Process clauses of the Fifth and Fourteenth Amendments to the UNITED STATES CONSTITUTION.

For the reasons stated above, Appellant believes that she cannot obtain a fair and impartial hearing of her case so long as Justice Vance sits on the appellate panel that will hear the case.

PRAYER FOR RELIEF

Appellant respectfully requests that the Honorable William R. Vance disqualify or recuse himself from participation in ruling on this case because his financial interest in protecting and garnering the good will of parties who have an interest in the outcome of the case creates a reasonable question as to whether Appellant can receive a hearing which is, and which appears to be, impartial as contemplated by the Due Process clauses of the Fifth and Fourteenth Amendments to the UNITED STATES CONSTITUTION.

Respectfully submitted,

s/"Sue Walston"
SUE WALSTON
Appellant
3231 Ferndale Drive
Waco, TX 76706
Telephone: 254.662.2270
Facsimile: 254.662.2270

IN THE
TENTH COURT OF APPEALS

No. 10-05-00193-CV

SUE WALSTON,
Appellant

v.

LARRY WALSTON, ET AL.,
Appellees

From the 19th District Court
McLennan County, Texas
Trial Court No. 92-3724-1

ORDER DENYING MOTIONS TO RECUSE OR DISQUALIFY

After Chief Justice Gray certified his recusal, the Chief Justice of the Supreme Court of Texas assigned the Honorable R. Al Scoggins, Jr., an active district judge to sit as a member of the panel in this case. Before Judge Scoggins was assigned, Sue Walston filed motions to disqualify or recuse Justices

Vance and Reyna. After Judge Scoggins's assignment, Walston filed an objection to the assignment and a motion to disqualify or recuse Judge Scoggins.

Disqualification and recusal of appellate judges is controlled by Rule 16 of the appellate rules.[1] TEX. R. APP. P. 16. A motion to disqualify may be raised at any time. *McCullough v. Kitzman*, 50 S.W.3d 87, 88 (Tex. App.—Waco 2001, order). Grounds for disqualification are set forth in the Constitution. TEX. CONST. art. V, ' 11; *see generally In re Union Pac. Res. Co.*, 969 S.W.2d 427 (Tex. 1998) (citing Kilgarlin & Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986)). Texas Rule of Civil Procedure 18b also lists the instances in which a justice is disqualified to hear a matter. TEX. R. CIV. P. 18b(1). The appellate rules do not currently provide a procedure for filing a motion for disqualification, so we have followed the recusal procedure to address the disqualification motions. TEX. R. APP. P. 16.3; *McCullough*, 50 S.W.3d at 88.

We have also utilized the procedure set forth in the rule to address the merits of the motions to recuse. TEX. R. APP. P. 16. Rule 18b lists the reasons why a justice should recuse himself or herself in a pending matter. TEX. R. CIV. P. 18b(2).

Under Rule 16.3, after receipt of the motions and prior to any further proceeding in this case, Justices Vance and Reyna and Judge Scoggins considered the motions in chambers.[2] TEX. R. APP. P. 16.3(b). None of them found a reason to disqualify or recuse himself and, under Rule 16.3(b), certified the issue to the panel assigned to this case. *Id.*; *McCullough*, 50 S.W.3d at 88. The panel then decided each motion with respect to the challenged justice or judge by a vote of the remaining members. *See id.* No challenged

justice or judge sat with the remainder of the panel when his challenge was considered. *See* TEX. R. APP. P. 16.3; *McCullough*, 50 S.W.3d at 88.

In each instance, the other members of the panel found that the justice or judge under consideration is not disqualified under article V, section 11 of the Texas Constitution, *i.e.*, does not have an interest in the subject matter of the controversy, is not related to a party by affinity or consanguinity within the third degree, and has not been counsel in the case. TEX. CONST. art. V, ' 11; TEX. R. APP. P. 16.1; TEX. R. CIV. P. 18b(1). Each motion to disqualify is denied with respect to the justice or judge who was challenged.

The determination of whether recusal is necessary must be made on a case-by-case, fact-intensive basis. *McCullough*, 50 S.W.3d at 89. In each instance, the remaining members of the panel found the motion without merit and found no reason to recuse the justice or judge under consideration. TEX. R. APP. P. 16.2, 16.3(b); TEX. R. CIV. P. 18b(2). Each motion to recuse is denied with respect to the justice or judge who was challenged.

Walston cites Justice Gammage's Declaration of Recusal in *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995), in support of her motions. We note, however, Justice Enoch's response in which he observes that four other members of the court, who were similarly challenged, neither recused themselves nor were recused by the court. *Id.* at 880 (Enoch, J. responding).

PER CURIAM

Before Justice Vance,
Justice Reyna, and
Judge Scoggins[3]

Motions denied
Order issued and filed April 19, 2006
[CV06]

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[1] We will apply the appellate rules even though one panel member is a district judge.

[2] As noted at the beginning of this order, Walston has also filed an objection to Judge Scoggins's assignment. *See* TEX. GOV'T CODE ANN. § 75.551(b) (Vernon 2005). However, an active district judge "is not subject to an objection" under section 75.551. *Id.* § 75.551(e) (Vernon 2005).

[3] The Honorable R. Al Scoggins, Jr., Judge of the 378th District Court of Ellis County, sitting by assignment of the Chief Justice of the Supreme Court of Texas pursuant to section 74.003(h) of the Government Code. *See* TEX. GOV'T CODE ANN. ' 74.003(h) (Vernon 2005).

106

No. 07-1508

Supreme Court, U.S.
FILED
SEP 18 2008
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SUE WALSTON,

Petitioner

v.

LARRY WALSTON, WILLIAM V. DUNNAM, JR., C. VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP AND CENTRAL TRANSPORTATION SYSTEMS

Respondents

On Petition for Writ of Certiorari To
The Court of Appeals For The Tenth District of Texas
At Waco, Texas

PETITIONER'S SUPPLEMENTAL BRIEF

SUE WALSTON
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SUPPLEMENTAL BRIEF

1. New petitions filed raising same complaint.

Since the original filing of Sue Walston's petition in this Court, two other cases have been filed here raising basically the same complaint. That the petitioners have been deprived of their Fourteenth Amendment right to due process because state court judges who heard their cases had accepted campaign contributions from parties with an interest in the outcome of the case.

Caperton, et al v. Massey, et al, 08-22, is a West Virginia case filed here on July 2, 2008, and *Dupre v. Telxon, et al*, 08-41, is an Ohio case filed on July 7, 2008. That there are three cases from three different states currently pending in the Court on the same issue supports Petitioner's contention that her case presents an important and recurring constitutional question about Due Process rights. The number of *amicus curiae* briefs filed in support of the *Caperton* case which has received a great deal of press attention is a further indication that the issue has become one of national concern.

Both Caperton and Dupre complain specifically of the appearance of bias where presiding judges had accepted substantial contributions from parties with an interest in their cases and, along with supporting *amici*, invite the Court to clarify the boundaries of due process by applying a 'how much is too much to be constitutionally intolerable' standard to judicial campaign contributions. But this approach literally necessitates a case-by-case examination. Hardly likely to resolve the issue, and most likely to spawn

still more controversy.

In her petition, Walston cites a survey sponsored by the Texas Supreme Court which found that 83% of Texas adults, 69% of court personnel, 79% of Texas lawyers and 48% of Texas judges believe that campaign contributions impacted judicial decisions "very" or "fairly" significantly. Pet. at 11. *Caperton*, *Dupre* and *amici* have cited surveys from several different states indicating similar results. Dupre Pet. at 30-31, CED amicus brief at 7, ABA amicus brief at 7-9 see notes. Nowhere in any of these surveys do participants indicate their belief that it is only high dollar contributions that impact judicial decisions.

Petitioner urges the Court to review her case, along with *Caperton* and *Dupre*, under the broader, and much more easily defined, approach of whether due process can be protected at all so long as any money is changing hands.

2. Recent campaign disclosure filings reveal further contributions by interested parties.

Campaign disclosure forms filed with the Texas Ethics Commission indicate that all of the attorneys representing respondents in this case have contributed to state appellate and supreme court justices' campaign and officeholder accounts in previous recent election cycles that overlapped the period when Petitioner's case was pending in those courts.

Campaign disclosure forms filed on July 15, 2008, indicate that attorneys for respondent Central Transportations Systems contributed substantial

amounts to the campaigns of at least two state supreme court justices just weeks before her motion for rehearing in that case was denied further clouding the outcome of the case with the appearance of partiality shown to contributors.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 18, 2008

No. 07-1508

SUPREME COURT U.S.
FILED
OCT 31 2008
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IN THE

SUPREME COURT OF THE UNITED STATES

SUE WALSTON,

Petitioner

v.

LARRY WALSTON, WILLIAM V. DUNNAM, JR., C. VANCE DUNNAM, JAMES R. DUNNAM, J. ROBERT ANGEL, DUNNAM & DUNNAM, LLP AND CENTRAL TRANSPORTATION SYSTEMS

Respondents

On Petition for Writ of Certiorari To
The Court of Appeals For The Tenth District of Texas
At Waco, Texas

PETITION FOR REHEARING

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HOWARD HUGE®

"Remember, Howard, we have to avoid even the appearance of wrongdoing."

From "LaughParade" by Bunny Hoest and John Reiner
Parade Magazine
August 21, 2005

PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner Sue Walston respectfully moves the Court for an order (1) vacating its denial of the petition for writ of certiorari entered on October 6, 2008, and (2) granting the petition in the interest of justice and for the following reason:

THE HOLDOVER OF PENDING CASE
CAPERTON, ET AL V. MASSEY, ET AL

Petitions for rehearing of an order denying certiorari are generally granted in two instances. One of those instances is if a petitioner can demonstrate "intervening circumstances of a substantial or controlling effect." Rule 44.2.

The petition for writ of certiorari in the instant case, filed on May 29, 2008, was distributed for the September 29th conference and denied on October 6th. A petition for writ of certiorari in *Caperton v. Massey, et al*, 08-22, filed on July 2, 2008, was distributed for the October 10th conference, but still has not been ruled upon as of the date of this filing.

Mr. Caperton complains in his petition that his Fourteenth Amendment right to due process was violated when a West Virginia judge who had accepted a substantial campaign contribution from the opposing party refused to recuse himself. The petition invites the Court to provide guidance as to how large a judicial campaign contribution may be accepted before the appearance of bias becomes constitutionally intolerable. The *Caperton* case has elicited *amicus curiae* support and has received substantial national press attention, including

supporting articles in the *New York Times* and the *Wall Street Journal*. The passage of time with no ruling lends the appearance that, at the very least, the Court is giving thoughtful consideration to granting the petition.

Ms. Walston also complained in her petition that her right to due process was violated when Texas judges who had accepted campaign contributions from parties or attorneys with an interest in her case refused to recuse themselves. She urges the Court to review the issue under the broader scope of whether due process can be protected at all so long as *any* money is changing hands.

In *Walston*, many of the same considerations are involved as will be before the Court in *Caperton*, should that petition be granted. In fact, a determination of whether *any* exchange of money is too much to be constitutionally tolerable would logically seem necessary before the Court becomes embroiled in state election laws and state rules of court by attempting to impose a limit on the amount of judicial campaign contributions a judge may accept before he must recuse himself. Limitation of the Court's review to the how-much-is-too-much approach would leave any case open to judge-picking where a litigant who desires to avoid having a particular judge hear a case has only to make a contribution to his campaign or officeholder account which exceeds the limit mandated by the U.S. Supreme Court in *Caperton*.

The close identity of issues in this case and the *Caperton* case amply justifies a reconsideration of the denial of certiorari here. In fact, should certiorari be

granted in *Caperton*, it would be most appropriate for the Court to hear and consider the instant case at the same time, thereby taking the opportunity to address and resolve the greater constitutional issue of whether our judicial system can fulfill its purpose when public confidence in the courts is eroded by perceptions of corruption and undue influence where judicial campaign contributions are involved.

The Court has previously reconsidered cases where the same or a related issue has come before the Court in other cases still pending. See *Pickett v. Union Terminal Co.*, 313 U.S. 591, 314 U.S. 704 (1941), 315 U.S. 386, 394 (1942); *Forgett v. United States*, 383 U.S. 926 (1966), 390 U.S. 203 (1968); *Simmons v. Sea-Land Services, Inc.*, 459 U.S. 931 (1982), 462 U.S. 1114 (1983). In *Florida v. Rodriquez*, 461 U.S. 940 (1983), the state cited as an "intervening circumstance" in its petition for rehearing the filing by the state of a petition for writ of certiorari in a related case. The petition for rehearing remained on the Court's docket for the next two years and ultimately was granted in view of the Court's decision in favor of the State of Florida in the related case.

For these reasons, and in the interest of justice, the denial of certiorari should be reconsidered.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, Petitioner prays that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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October 31, 2008

CERTIFICATE OF COMPLIANCE

Petitioner hereby certifies that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

_____

Sue Walston